IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 402.

HONORABLE PAUL LEAHY, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE AND NATIONAL CAN CORPORATION,

Petitioners,

—against—

THE CANISTER COMPANY AND THE CANISTER COMPANY, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION.

1. Since the petition for certiorari was filed in this case, a similar petition has been filed in the case of *Palumbo v. Ganey,* (3rd Cir.) No. 432, this Term, filed November 16, 1951. While the contentions of the petitioners in this case and in the *Palumbo* case as to the availability of mandamus in a court of appeals to review interlocutory orders are diametrically opposed, we submit that the difference in attitude of the court below in the two cases presents additional grounds for review by this Court. If mandamus is not available in the *Palumbo* case to protect the freedom

of an individual defendant from a charge of criminal contempt for failure to obey a prosecutor's order, it should not be available in the instant case to insure the corporate respondents a jury trial on the issue of damages. The difference in attitude of the court below demonstrates the unsettled nature of the question and the public importance of a final determination by this Court.

2. In respondents' brief in opposition to the petition for certiorari reliance is placed upon *Bereslavsky v. Caffey,* 161 F. 2d 499 (2d Cir. 1947), cert. den. 332 U. S. 770 (1947) and *Bereslavsky v. Kloeb,* 162 F. 2d 862 (6th Cir. 1947), cert. den. 332 U. S. 816 (1947), both as to the availability of the writ of mandamus in a court of appeals to review interlocutory orders and as to the correctness of the ruling of the court below that respondents are entitled to a jury trial on the issue of damages.

However, the Court of Appeals in *Bereslavsky v. Caffey* misconceived the nature of the cases decided by this Court which it cited in support of its power to issue the writ. In *Ex parte Peru,* 318 U. S. 578 (1942), the issue involved the protection of the immunity of a friendly foreign power. In *United States Alkali Association v. United States,* 325 U. S. 196 (1945), the question presented not only went to the jurisdiction of the district court to entertain the suit, but, if the defendants in that suit had been right in their contention, a trial on the merits would have frustrated the statutory scheme which Congress had designed for the control of anti-trust activities. In *Los Angeles Brush Mfg. Corp. v. James,* 272 U. S. 701 (1926), the court said that a writ would issue to prevent a persistent disregard of the rules of procedure prescribed by the Supreme Court. It is clear that the three cases discussed were "really extraordinary causes" within the meaning of the *Fahey* case (332 U. S. 258 (1947)). Moreover, no writs were issued in the *United States Alkali* and *Los Angeles Brush* cases and no writ was issued in *Ex parte Peterson,*

253 U. S. 300 (1919). The language in the *Peterson* case on which Judge Frank relied in *Bereslavsky v. Caffey* is merely dictum; the dictum, moreover, depends entirely upon *Ex parte Simons,* 247 U. S. 231 (1918), and is subject to the same criticism as that case (see petition for certiorari herein, pp. 13-15). Thus, the decision in *Bereslavsky v. Caffey* is not only not supported by the decisions upon which it relies, but it is also inconsistent with the pertinent decisions of this Court which are discussed at pages 9 to 16 of the petition for certiorari.

Our comments on *Bereslavsky v. Caffey* apply equally as well to *Bereslavsky v. Kloeb.*

With respect to the effect of the *Bereslavsky* cases as authority to support respondents' right to a jury trial on the issue of damages, we respectfully submit that the discussion at pages 16 to 21 of the petition for certiorari demonstrates that the *Bereslavsky* cases, as well as the decision below, conflict in principle with *Keene v. Hale-Halsell Co.,* 118 F. 2d 332 (5th Cir. 1940) and *Bruckman v. Hollzer,* 152 F. 2d 730 (9th Cir. 1946), and are contrary to the letter and spirit of the Federal Rules. Respondents argue at page 10 of their brief in opposition that Canister presented a single issue by the original complaint. But, as we have shown in the petition for certiorari, the evidence which would support the granting of specific performance would not necessarily support the granting of money damages; similarly, evidence which would support the granting of money damages would not necessarily support the granting of specific performance. Hence, two issues were originally presented to the trial court: Canister's right to specific performance and its right to damages. Respondent's attempt to distinguish the *Keene* and *Bruckman* cases is not well taken.

CONCLUSION.

For the foregoing reasons and for the reasons advanced in the petition for certiorari, the petition should be granted.

Respectfully submitted,

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